

1997

Glen D. Wardle and Thora Wardle v. Lester Romero : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GLEN D. WARDLE and THORA	:	
WARDLE,	:	
	:	Case No. 970139-CA
Plaintiffs-Appellees,	:	
	:	
v.	:	
	:	Priority No. 15
LESTER ROMERO,	:	
	:	
Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT

APPEAL FROM A DECISION OF THE
SECOND DISTRICT COURT, DAVIS COUNTY, STATE OF UTAH
HONORABLE RODNEY S. PAGE

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FILED

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COURT OF APPEALS

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LESTER ROMERO,

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INTRODUCTION

Defendant submits the following response to the allegations and arguments contained in plaintiff's brief:

POINT I.

The Defendant has Sufficiently Marshalled the Evidence in Support of the Trial Court's Findings and Demonstrated That Such Findings Were Clearly Erroneous

In Point I of their brief, plaintiffs argue that defendant has failed to "marshal the evidence" supportive of the findings of the trial court upon which this appeal is based.¹ However, as set forth in defendant's brief, it is clear that he has satisfied the threshold requirement of first presenting to the reviewing court, the evidence upon which the lower court based its findings and then demonstrating why such findings are legally insufficient, clearly erroneous and should be therefore be set aside.²

a. Standard for Marshalling the Evidence

It is well established that in order to properly challenge the correctness of the Trial Court's Findings of Fact, the defendant is required to first marshal all the evidence supporting the disputed finding and then to also demonstrate that such evidence is legally insufficient to support the findings even when viewed in the light most favorable to the trial

¹ Appellees' Brief, page 7.

² Appellant's Brief, page 11-22.

court.³ In determining the legal sufficiency of the evidence supporting the challenged finding, the reviewing court is constrained by the standard set forth in Rule 52(a) of the Utah Rules of Civil Procedure which provides as follows:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

In this case, defendant challenges the legal sufficiency of Finding of Fact No. 4, regarding the determination of the payment of an acknowledged obligation owed by plaintiffs to defendant.⁴

b. Evidenced Marshalled by Defendant

The critical issue before the Trial Court was when, and if, defendant received payments from the plaintiffs on the obligation after 1965, thereby determining whether the applicable statute of limitations period was tolled.⁵ The Trial Court resolved such issue by determining the credibility of the payment schedule maintained by defendant and received as plaintiffs' Exhibit 19 and defendant's Exhibit 4. (the "Payment Schedule").⁶ It should be noted that the Payment Schedule was mistakenly referred to as plaintiff's Exhibit 18 in the Trial Court's Findings of Fact as well as in defendant's brief.⁷ The Payment Schedule is

³ Reid v. Mutual of Omaha Insurance Co., 776 P.2d 896, 899-900 (Utah 1989).

⁴ Findings, paragraph 4.

⁵ Id.

⁶ Id.

⁷ Id.

correctly referred to and marked in plaintiffs' brief as plaintiffs' Exhibit 19. Therefore, all references in defendant's brief as well as the Trial Court Findings to plaintiffs' Exhibit 18 actually intend to reference the document attached to plaintiffs' brief and referred to therein as plaintiffs' Exhibit 19. In finding the Payment Schedule not credible, the Trial Court received the testimony of Mrs. Wardle and her daughter Maxine Romero. In addition, the Trial Court also received testimony from defendant concerning his method of recording the payments received from plaintiffs.

Contrary to plaintiffs' argument, defendant has sufficiently "marshalled the evidence" supporting the challenged finding by presenting a complete chronology of the relevant testimony of both Mrs. Wardle and her daughter Maxine Romero, the witnesses most supportive of finding No. 4.⁸ As revealed in defendant's brief, the testimony of such witnesses was not credible. As a result, defendant clearly demonstrated that there was simply insufficient evidence to sustain the Trial Court's finding that no payments were received on the obligation after 1965.⁹

In reviewing the testimony of Mrs. Wardle, it is clear that she lacks the ability to understand and recall important details of the parties' transaction. Specifically, the statements by Mrs. Wardle that the obligation to defendant had been fully satisfied despite an express acknowledgement to the contrary, and

⁸ Appellant's Brief, pages 12-19.

⁹ Id.

that it was not possible that Mr. Wardle may have made payments to defendant, along with Mrs. Wardle's inability to recall when and if, she had signed critical documents, clearly demonstrated a lack of credibility upon which the Trial Court erroneously based its findings.¹⁰

In their brief, plaintiffs note that defendant also testified concerning the Payment Schedule and its reliability.¹¹

Specifically, defendant testified that he made a mistake in recording the last payment received from plaintiffs as being in 1992 instead of 1991.¹² Such testimony by defendant was also set forth in defendant's brief.¹³ That defendant had made a single mistake in recording payments over a thirty (30) year period coupled with Mrs. Wardle's denial of making payments after 1980, was the extent of the plaintiffs' evidence challenging the credibility of the Payment Schedule.

It is clear from the Trial Court's findings that although the admitted discrepancies of defendant's Payment Schedule may have diminished its credibility, the Trial Court's ultimate decision was based on the determination that the testimony of Mrs. Wardle and her daughter Maxine Romero was more persuasive and credible than defendant's testimony to the contrary. As a result, because the Trial Court specifically found that no

¹⁰ Id., pages 16-18.

¹¹ Appellees' Brief, page 5.

¹² Tr. 90-91.

¹³ Appellant's Brief, page 14.

payments were received after 1965, and not that the last payment was received in 1992 rather than 1991, the defendant's testimony regarding the mistake in entering the final payment as being received in 1992 instead of 1991 was not necessarily essential to the Trial Court's findings.

POINT II.

**Appellant Has in Fact Argued That
There is Insufficient Evidence Supporting
the Trial Court's Findings**

In Point II of their brief, plaintiffs argue that defendant has actually conceded that the evidence supports the Trial Court's findings and that as a result, the defendant is not even arguing that there is insufficient evidence supporting the Trial Court's findings.¹⁴ Such an argument is not persuasive and is not supported by any statement or inference contained in defendant's brief. On the contrary, defendant's entire argument and brief is based on the assertion that the challenged finding is "against the clear weight of the evidence" and is therefore clearly erroneous. Although defendant is required to "marshal the evidence supporting the finding", by simply restating such requirement within his brief does not mean that defendant has conceded that the evidence presented at trial was in fact sufficient or adequate to support the Trial Court's findings.

As previously set forth by defendant, the challenged finding completely disregarded the unchallenged testimony and credibility

¹⁴ Appellees' Brief, page 7-8.

of defendant as well as the inconsistent and unreliable testimony of plaintiff. In addition, the finding ignored the obvious bias and unreliable testimony of Maxine Romero on issues which she conceded she was not familiar. Furthermore, plaintiffs presented no direct evidence challenging defendant's credibility or ability to recall critical details of the parties' transaction.

Even after presenting the evidence supporting the Trial Court's findings, the clear weight of all the evidence is that defendant's testimony and recollection was more credible and reliable and that no time did a period of more than six years elapse between payments by the plaintiffs on their obligation to defendant, thereby tolling the statute of limitations pursuant to § 78-12-44, Utah Code Ann. (1953 as amended).

While it is true that the defendant has a heavy burden and that the Trial Court's findings are generally upheld, where, as in this case, "a finding is so plainly unreasonable that no trier of the fact could fairly make such a finding, it cannot be said to be supported by substantial evidence¹⁵ and the finding will be rejected as a matter of law, and the fact determined otherwise.¹⁶

¹⁵ Ranch Homes, Inc. v. Greater Park City Corp., 592 P.2d 620, 626 (Utah 1979) (Citing Seybold v. Union Pac. R. Co., 239 P.2d 174 (1951)).

¹⁶ Id. citing Continental Bank & Trust Co. v. Stewart, 291 P.2d 890 (1955).

CONCLUSION

As previously set forth in defendant's brief, the overwhelming weight of the credible evidence before the Trial Court demonstrates that the Trial Court was in error in finding that no payments were received after 1965. As a result, the defendant respectfully submits that the Court may properly reverse the decision of the Trial Court on the grounds that the overwhelming weight of the evidence was contrary to the Trial Court's findings and was therefore clearly erroneous.

DATED this 5th day of August, 1997.

APPEL & WARLAUMONT, L.C.

By 

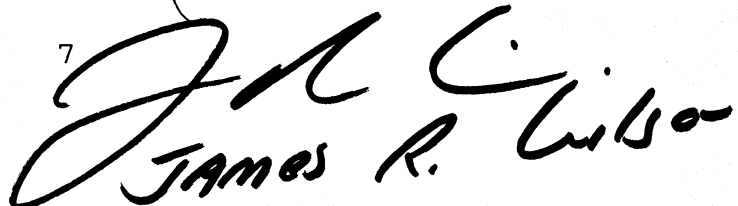
James R. Wilson
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 1997, I caused two copies of REPLY BRIEF OF DEFENDANT-APPELLANT to be Hand Delivered to:

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